No. 96-643

In the Supreme Court of the United States

OCTOBER TERM, 1996

THE STEEL COMPANY, A/K/A CHICAGO STEEL AND PICKLING COMPANY, PETITIONER

v.

CITIZENS FOR A BETTER ENVIRONMENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a citizen may sue to enforce the reporting requirements of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) against a defendant who violates the Act by failing to file the required reports on time, but who then files them after receiving statutory notice of the intended suit and before the complaint is filed.

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INTEREST OF THE UNITED STATES

The Environmental Protection Agency (EPA) plays the lead role in implementing and enforcing the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. 11001 *et seq*. The present case, in which the United States appeared and argued as amicus curiae in the court of appeals, concerns the prerequisites for a private suit brought to enforce EPCRA requirements. Resolution of this case will have a direct and substantial effect on systematic enforcement of, and compliance with, the Act.

STATEMENT

1. The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11001 *et seq.*, protects public health, public safety, and the environment by ensuring public and official access to information on invento-ries and releases of hazardous and toxic

chemicals. This case involves two of EPCRA's central reporting requirements.

Section 312(a) requires covered facilities to submit annual emergency and hazardous chemical inventory forms ("inventory forms") to the State in which the facility is located, local officials, and fire departments. 42 U.S.C. 11022(a). Congress adopted that reporting requirement in part to enhance community emergency preparedness after a company's accidental release of highly toxic chemicals in Bhopal, India, killed more than 2,000 people, and after many domestic accidents. 131 Cong. Rec. 24,060 (1985) (statement of Sen. Lautenberg). During the five years preceding EPCRA's enactment, the United States experienced at least 6,928 toxic chemical accidents that, in total, killed more than 135 people, injured approximately 1,500, and forced more than 200,000 others to evacuate their homes, schools, or businesses. John L. Spilsbury, *The Hazardous Chemicals Right-to-Know Act: Letting the Public Know What's Next Door*, 64 N.C. L. Rev. 1330, 1330 (1986).

Section 313(a) of EPCRA requires covered facilities to report toxic chemical releases to the State and the Environmental Protection Agency (EPA) on an annual basis. 42 U.S.C. 11023(a). EPCRA expressly ordains that such information is of particular importance to the public. Toxic chemical release reports "are intended to provide information to the Federal, State, and local governments *and the public, including citizens of communities surrounding covered facilities*." 42 U.S.C. 11023(h) (emphasis added).

EPCRA establishes strict annual deadlines for facilities to submit inventory forms and toxic chemical release forms. Prompt, regular reporting is critical to effective community emergency planning and the safety of firefighters and other emergency response officials. See 131 Cong. Rec. 24,060-24,061 (1985); *Value of EPCRA Information Proven in Fatal Explosion*, 4 Right-to-Know Planning Guide (BNA) No. 21, at 4 (July 4, 1991) (EPCRA

reporting vital in responding to explosion of fertilizer plant); *EPCRA Data Plays Major Role in Midwest Flood Response*, 6 Right-to-Know Planning Guide (BNA) No. 24, at 4 (August 12, 1993) (emergency response officials relied on EPCRA data to identify possibly hazardous conditions after 1993 midwestern floods).

EPCRA also provides for unprecedented public access to the inventory and toxic chemical release information, which must be made available to the general public at convenient locations and times. 42 U.S.C. 11044(a). Consistent with the annual reporting cycle, local emergency planning organizations must publish annual notices in local newspapers announcing that inventory forms have been received. 42 U.S.C. 11044(b). EPA must maintain a national toxic chemical inventory in a publicly accessible computer data base. 42 U.S.C. 11023(j).

EPCRA reporting provides information disclosure that is an effective and efficient supplement to traditional regulatory controls, because it "encourage[s] informed community-based environmental decision making and provide[s] a strong incentive for businesses to find their own ways of preventing pollution." President William J. Clinton, *Memorandum for the Administrator of the Environmental Protection Agency and the Heads of Executive Departments and Agencies*, 60 Fed. Reg. 41,791, 41,791 (1995); see also 42 U.S.C. 11023(h) (describing uses of toxic release inventory information). During the period that petitioner did not file EPCRA reports, total reported toxic chemical releases decreased by 43% nationwide. The fabricated metals and primary metals industries, in which petitioner operates, reduced reported toxic chemical releases by 237 million pounds and 46 million pounds, respectively. *1993 EPA Toxics Release Inventory* 173, 184 & Table 3-7, at 185 (March 1995).

2. EPCRA provides for enforcement by EPA, 42 U.S.C. 11045, by state and local governments and emergency response commissions, 42 U.S.C. 11046(a)(2), and by citizens, 42 U.S.C. 11046(a)(1). EPCRA Section 326(a)(1) author-

izes "any person" to sue "[a]n owner or operator of a facility for failure to do" certain things. 42 U.S.C. 11046(a). Among the violations actionable by citizens are an owner's or operator's failure to "[c]omplete and submit an inventory form under" Section 312(a) and an owner's or operator's failure to "[c]omplete and submit a toxic chemical release form under" Section 313(a). 42 U.S.C. 11046(a)(1). Before bringing suit, the citizen must provide 60-days notice to EPA, the State in which the facility is located, and the violator. 42 U.S.C. 11046(d)(1).

3. On March 16, 1995, respondent notified EPA, the State of Illinois, and petitioner of respondent's intention to file suit because petitioner had not submitted annual EPCRA inventory or toxic chemical release forms for more than seven years. On May 1, 1995, after receiving respondent's 60-day notice letter, petitioner submitted the overdue inventory and release forms. EPA did not bring an enforcement action against petitioner. Pet. App. A8; J.A. 18.

4. On August 7, 1995, respondent filed a complaint under EPCRA Section 326(a)(1), 42 U.S.C. 11046(a)(1). The complaint alleges that petitioner "failed to submit chemical inventory forms to the [state emergency response and local emergency planning bodies] and the appropriate fire department, on or before March 1, 1988, and annually thereafter," in violation of EPCRA Section 312, and "failed to timely submit chemical release forms to the EPA and designated state agency on or before July 1, 1988, and annually thereafter," in violation of EPCRA Section 313. J.A. 8, 10.

The complaint alleges that respondent has offices in Chicago, where petitioner's facility is located, and that its members "reside, own property, engage in recreational activities, breathe the air, and/or use areas near [petitioner's] facility." J.A. 4, 5. According to the complaint, "[respondent's] members seek, acquire and use data reported by facilities under EPCRA to learn about toxic chemical releases, the use of hazardous substances in

their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work, and visit." J.A. 5. The complaint alleges that "[t]he safety, health, recreational, economic, aesthetic and environmental interests of [respondent's] members and their right to know about such releases have been, are being, and will be adversely affected by [petitioner's] actions in failing to file timely and required reports under EPCRA." *Ibid.*

To address these injuries, respondent's complaint seeks a declaratory judgment, civil penalties, and an injunction. The injunction is to require petitioner to permit respondent to inspect its facilities and records for EPCRA compliance for at least one year, and to require petitioner to send its EPCRA reports to respondent when they are filed for a period of at least one year. Respondent also sought an award of attorneys fees and costs. J.A. 11.

5. The district court granted petitioner's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), holding that EPCRA's citizen suit provision does not allow citizen enforcement against "historical violations of the Act." Pet. App. A24. Relying on the Sixth Circuit's decision in *Atlantic States Legal Foundation, Inc.* v. *United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (1995), the court noted that the citizens' suit provision of EPCRA authorizes suits for "failure to * * * [c]omplete and submit [required forms] under [EPCRA's substantive provisions]." Pet. App. A22. The court read that language to permit citizens' suits only for complete failures to file, not for failures to file on time. *Id.* at A22, A24. The court also stated that the 60-day notice provision would serve no purpose and EPA's enforcement discretion would be undermined if a citizen could sue for a failure to file reports that the defendant had then filed before the suit commenced. *Id.* at A23-A24.

6. The court of appeals reversed, holding that EPCRA does authorize citizens' suits against defendants who violate EPCRA's reporting requirements by submitting

untimely EPCRA forms only after receiving the citizen's 60-day notice of intention to sue. Pet. App. A1-A15. The court rejected petitioner's argument that EPCRA permits citizens' suits only in circumstances in which the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, as construed in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), permits citizens' suits. The court based its decision on key differences in the language Congress used in the CWA provisions at issue in *Gwaltney* and the EPCRA provisions at issue here.

The court noted that EPCRA authorizes citizens' suits "for failure to complete and submit" the reports "under" EPCRA's substantive provisions; the court construed "under" to mean "in accordance with the requirements of" the substantive provisions—including the requirements for annual filing by a certain date. Pet. App. A11-A12. The CWA provision at issue in *Gwaltney* does not contain the "failure to complete and submit * * * under" language.

The court of appeals also noted the use of the past tense in EPCRA's venue provision, which authorizes suits "in the district court for the district in which the alleged violation occurred," 42 U.S.C. 11046(b)(1), and therefore confirms that suit can be brought for a violation that is completed at the time suit is brought. Pet. App. A13. The CWA provision at issue in *Gwaltney* does not contain that language.

The court of appeals explained that its decision would not defeat the purpose of the EPCRA 60-day notice provision. In *Gwaltney*, this Court referred to the purpose of the CWA's 60-day notice requirement to allow violators to avoid suit by bringing themselves into compliance. See 484 U.S. at 61. The court of appeals noted that the EPCRA notice provision "gives an alleged violator a chance to correct the citizen's information if the citizen is mistaken about the existence of a violation"; it "preserves the EPA's enforcement discretion, giving the Agency a chance to take enforcement action if it chooses" and thereby preclude the citizens' suit; and it "conserves resources

by giving violators the opportunity and the incentive to enter into settlement negotiations with citizens or the EPA." Pet. App. A13-A14. The court held that, because those purposes would be served by permitting citizens' suits in cases like this, permitting such suits would "not render the [EPCRA] notice provision gratuitous." *Id.* at A13.

Finally, the court explained that if a violator could automatically preclude suit by submitting EPCRA forms after receiving a citizen's notice of intention to sue, "[t]he incentives created by the district court's interpretation would render the citizen enforcement provision virtually meaningless." Pet. App. A14. That is because, under such a regime, "citizen suits could only proceed when a violator receives notice of intent to sue and still fails to spend the minimal effort required to fill out the forms and turn them in." *Ibid.* In that situation, given the costs of "monitoring chemical use and keeping up to date on changes in EPCRA requirements" by citizens, rather than regulated industrial users, "[p]rivate enforcement * * * would undoubtedly drop off." *Id.* at A15.

SUMMARY OF ARGUMENT

1. Section 326 of EPCRA contains detailed and unambiguous requirements for a citizens' suit. 42 U.S.C. 11046. A facility owner who has not filed reports at the time citizens give notice of suit, but who files the forms thereafter, is subject to citizens' suit under EPCRA. Three provisions are of particular relevance in this respect.

First, Section 326(a)(1) provides that citizens' suits may be brought "for failure to * * * [c]omplete and submit" inventory forms or toxic chemical release forms "under" the EPCRA provisions requiring those forms. The recognized meaning of the term "under" in this context is "in accordance with." Section 326(a)(1) therefore authorizes citizens' suits against facility owners who have failed to comply with reporting requirements of Sections 312(a) and

313(a)—including the failure to submit reports at all, the submission of false or incomplete reports, or (as in this case) the submission of untimely reports.

Second, Section 326(b)(1) provides that citizens' suits "shall be brought in the district court for the district in which the alleged violation occurred." 42 U.S.C. 11046(b)(1). Therefore, a citizens' suit may be brought even when the violation has already been completed—*i.e.*, it has "occurred"—at the time of filing of the suit.

Third, Section 326(d)(1) provides that citizens may not sue until 60 days after they have given notice of suit "to the Administrator [of EPA], the State in which the alleged violation occurs, and the alleged violator." 42 U.S.C. 11046(d)(1). The Act thus specifies that the violation has to be ongoing—*i.e.*, it "occurs"—at the time when the 60-day notice is given. The contrast with subsection (b)(1) is telling, and determinative of the question in this case.

Because the terms of the statute are unambiguous, this Court should reject petitioner's various arguments that the statute must be interpreted to preclude a citizens' suit when the facility owner files the required EPCRA reports after having received notice of a citizens' suit but before the suit is filed. It is of little relevance that some other environmental statutes, such as the CWA, whose key provisions employ different language from EPCRA and which embody fundamentally different regulatory schemes from EPCRA, limit citizens' suits in ways in which EPCRA does not. Indeed, in the context of a reporting statute like EPCRA, authorizing citizens' suits would have been largely a futile gesture if potential defendants could avoid suit altogether by delaying their filings or otherwise failing to comply—perhaps repeatedly—until they received a citizen's notice of suit.

2. The Article III case-or-controversy requirement does not bar respondent's action for relief against petitioner, which persisted in its illegal conduct until receiving notice of respondent's intention to sue. The complaint in this case adequately alleges that respondent and its

members suffered an injury-in-fact by not having had timely access to the information that would have been available had petitioner filed its EPCRA reports as required by the statute. Because petitioner voluntarily ceased its illegal activity only after receiving the statutory notice of suit, the dispute remained alive as to petitioner's future EPCRA compliance—and the threat of future injury to respondent and its members—at the time suit was filed. Finally, the civil penalties, injunction, and declaratory judgment sought by the complaint would redress respondent's injury, because they would specifically deter future illegal conduct by petitioner that otherwise would directly injure respondent and its members.

ARGUMENT

I. EPCRA AUTHORIZES CITIZENS TO SUE PERSONS WHO FILE OVERDUE REPORTS ONLY AFTER HAVING RECEIVED NOTICE OF A CITIZEN'S INTENTION TO SUE

A. The Terms Of The Statute Authorize Citizen Suit If The Defendant Has Not Filed Required Reports When The Citizen Provides Statutory Notice of Intent To Sue, But Then Files The Overdue Reports Prior To Commencement Of The Suit

"The starting point in statutory interpretation is 'the language [of the statute] itself.'" *Ardestani* v. *Immigration & Naturalization Serv.*, 502 U.S. 129, 135 (1991) (alteration in original) (quoting *United States* v. *James*, 478 U.S. 597, 604 (1986)). EPCRA is not ambiguous. It expresses a clear congressional intent that citizens be able to enforce all the reporting requirements under EPCRA Sections 312(a) and 313(a), including the requirement that reports be filed by a date certain.

1. Section 326(a)(1) of EPCRA authorizes citizens to commence a civil action for penalties or an injunction

against a facility owner or operator for "failure to do" several things required by EPCRA, including failure to "[c]omplete and submit an inventory form under [Section 312(a)]" and failure to "[c]omplete and submit a toxic chemical release form under [Section 313(a)]." 42 U.S.C. 11046(a)(1)(A)(iii) and (iv). As the court of appeals held (Pet. App. A11), the "most natural reading of 'under' " in this context is "in accordance with the requirements of." See *Webster's Third New Int'l Dictionary* 2487 (1986) (defining "under" as "required by: in accordance with: bound by"); *Random House Dictionary of the English Language* 2059 (2d ed. 1987) (defining "under" as "in accordance with: *under the provisions of the law*"). Thus, Congress authorized citizens to enforce EPCRA against persons who fail to file reports in accordance with the various requirements of Sections 312(a) and 313(a). A failure to submit a form at all, a submission of a false or incomplete form, or a submission of a tardy form are all equally subject to citizen enforcement. Cf. *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 617 (1992) (citizens' suit provision that "incorporat[es]" a penalty provision through the use of the term "under" "must be read as encompassing all the terms of the penalty provisions").

2. EPCRA's citizens' suit provisions make clear in another way that citizens may sue for a violation that is not ongoing at the time suit is filed. Section 326(b)(1) provides that citizens' suits "shall be brought in the district court for the district in which the alleged violation *occurred*." 42 U.S.C. 11046(b)(1) (emphasis added). Thus, a citizens' suit may be brought even when the violation has already been completed—it has "occurred"—at the time of filing of the suit. The express language of the statute therefore establishes that at least some past violations of the statute are actionable in citizens' suits. "[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Metropolitan Stevedore Co.* v. *Rambo*, 115 S. Ct. 2144, 2147 (1995).

3. Finally, EPCRA's terms also make clear that not all past violations are actionable in a citizens' suit. Such a suit may be brought for violations that were ongoing at the time statutory notice is given to the defendant. Specifically, under Section 326(d)(1), "[n]o action may be commenced * * * prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation *occurs*, and the alleged violator." 42 U.S.C. 11046(d)(1) (emphasis added). Just as the use of the past-tense term "occurred" in the venue provision—especially in conjunction with the "failure to * * * [c]omplete and submit * * * under" language in the earlier subsection—confirms that the violation may have been completed at the time suit is brought, use of the present-tense term "occurs" in the notice provision demonstrates that (in the context of this statute) the violation has to be ongoing at the time notice is given.

Indeed, the juxtaposition of the terms "occurs" and "occurred" in the two subsections is telling. Congress could easily have used either term in both provisions. The fact that Congress chose to use the terms that it did in each of these subsections of the same Section shows that Congress specified that citizens' suits could be brought for past violations, but that the violations must have been ongoing at the time the citizen gives notice.

B. This Court's Interpretation Of The Clean Water Act In *Gwaltney* To Preclude Similar Citizens' Suits Does Not Govern This Case

Petitioner's primary argument is that, because this Court in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), held that the Clean Water Act does not permit citizens' suits for violations that have been abated by the time of suit, this Court should reach the same conclusion regarding EPCRA. See Pet. 16-17, 20-24, 25-27. That argument is mistaken. This Court in *Gwaltney* specifically rejected the conten-

tion that Congress's precise choice of words should be disregarded as a "careless accident" or a "debatable lapse of syntactical precision." 484 U.S. at 57. Because the key EPCRA provisions differ significantly from the corresponding CWA provisions, Congress's choice of words in EPCRA should be given effect, just as Congress's choice of different words was given effect in *Gwaltney*. Insofar as the statutory purposes may be consulted to aid in interpretation, there are substantial differences between a reporting statute such as EPCRA and a statute primarily regulating substantive conduct such as the CWA. Those differences support the reasonableness of Congress's choice to permit citizens' suits under EPCRA—but not under the CWA—for violations that were ongoing at the time of notice but no longer ongoing by the time of suit.

1. a. The operative language regarding the scope of citizens' suits is significantly different in EPCRA and the CWA. EPCRA permits citizens' suits for "failure to * * * [c]omplete and submit an inventory form under [Section 312(a)]" and "failure to * * * [c]omplete and submit a toxic chemical release form under [Section 313(a)]." 42 U.S.C. 11046(a)(1)(A)(iii) and (iv). In comparison, the corresponding language in the CWA provides for a citizens' suit "against any person * * * who is alleged to be in violation" of certain CWA provisions. 33 U.S.C. 1365(a). "The most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation." *Gwaltney*, 484 U.S. at 57. By contrast, as the court of appeals explained in this case, the "failure to * * * [c]omplete and submit * * * under" language of EPCRA "contains no temporal limitation; 'failure to do' something can indicate a failure past or present." Pet. App. A11.

Congress's deviation in EPCRA from the CWA "to be in violation" formulation cannot properly be assumed to have been accidental. EPCRA was enacted in the same piece of legislation as the citizens' suit provisions in the Comprehensive Environmental Response, Compensation,

and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* See Pub. L. No. 99-499, Tits. II and III, 100 Stat. 1613, 1728 (1986). Yet the CERCLA citizens' suit provision, unlike EPCRA, employs the same "to be in violation" formulation as does the CWA. See 42 U.S.C. 9659(a)(1). Although petitioner would simply disregard Congress's decision to use a different formulation in EPCRA, " 'it is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another.' " *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338 (1994). By including the "failure to * * * [c]omplete and submit * * * under" formulation in EPCRA, Congress manifested its understanding that EPCRA citizen suitors need not allege the defendant "to be in violation" at the time suit is filed.

Petitioner argues (Br. 32) that the "failure to * * * complete and submit" under the formulation in Section 326 simply serves as "a reference to Section 312's inventory form and Section 313's Form R—and not a wholesale incorporation of those sections' requirements." That construction would permit citizens' suits when a covered party entirely failed to file forms or filed forms that were incomplete, while barring such suits when a covered party filed a belated form or "completed" a form by filling out every line with false—even intentionally false—information and submitting the forms to the requisite party. Petitioner offers no reason why Congress would have wanted to leave such a gaping hole in EPCRA's citizen enforcement provision, and the legislative history makes no reference to such a curious elision.[1]

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[1] Indeed, Congress had good reason to be especially concerned about late EPCRA reporting. Late reports are more likely to be inaccurate, since a party making a late report will likely have lower quality data available and EPCRA generally requires that reports need only be "estimates" of chemical inventories and releases. See 42 U.S.C. 11022(d)(1)(B), 11022(d)(2), 11023(g)(1)(C); see also 42 U.S.C. 11023(g)(2) (under Section 313, "the owner or operator may use readily

Moreover, petitioner's reading would make the use of "under section 312(a)" and "under section 313(a)" superfluous. The term "inventory form" has a designated meaning in EPCRA without the qualification "under Section 312," because Section 312 expressly provides that covered parties "submit an emergency and hazardous chemical inventory form (*hereafter in this chapter referred to as an 'inventory form'*)." 42 U.S.C. 11022(a)(1) (emphasis added). Similarly, the term "toxic chemical release form," although not specifically defined, plainly refers to the form required by Section 313, as Congress recognized when it used that term without express reference to Section 313 elsewhere in the statute. See 42 U.S.C. 11043(b), 11044(a). Congress thus had no need to use the qualifiers "under section 312(a)" and "under section 313(a)" merely to identify the forms at issue. Cf. *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (court's "duty [is] 'to give effect, if possible, to every clause and word of a statute' "); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 311 (1829) ("[T]hese words materially affect[] the construction of the article. They cannot be rejected as surplusage."). But Congress had every reason to use those terms in order to make clear that covered parties that failed to satisfy the requirements of Sections 312(a) and 313(a) would be subject to citizens' suits.

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available data" and need not conduct any additional monitoring or measurement). In addition, it may be difficult to recompile data compilations and databases—relied upon by the public, a statutory beneficiary of EPCRA, see 42 U.S.C. 11023(h)—to incorporate late reports. Third, data contained on the reporting forms are analyzed immediately by federal, state, and local officials, as well as citizens, and used in their decisionmaking. When a firm fails to meet the statutory deadlines, that violation undermines informed federal environmental policy and may cause miscalculations or errors that cannot later be rectified; the submission of information for previous years may provide no assistance at all to those who are attempting to plan for current needs, and it may endanger those, like firefighters, who rely on accurate and timely EPCRA reports. See 131 Cong. Rec. 24,060-24,061 (1985) (statement of Sen. Lautenberg).

b. The EPCRA provision authorizing suits "in the district court for the district in which the alleged violation *occurred*," 42 U.S.C. 11046(b)(1) (emphasis added), also differs from the corresponding CWA provision, which provides that citizens' suits "may be brought * * * only in the judicial district in which [the discharge] source *is located*." 33 U.S.C. 1365(c)(1) (emphasis added).[2] The CWA provision is an example of what this Court in *Gwaltney* termed the "undeviating use of the present tense" in the CWA, see 484 U.S. at 59, which, the Court held, virtually compels the conclusion that the discharge must be occurring at the time suit is filed. By contrast, the EPCRA provision specifically uses the past tense—"the district in which the alleged violation occurred." Congress thereby utilized in EPCRA—unlike in the CWA—language that would authorize suits (in at least some circumstances) for violations that had been abated by the time suit was filed.[3]

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[2] The third EPCRA provision discussed above—providing that citizen suitors must give notice to "the State in which the alleged violation *occurs*," 42 U.S.C. 11046(d)(1) (emphasis added)—uses language identical to that in the corresponding CWA provision. See 33 U.S.C. 1365(b)(1)(A)(ii). There is no other EPCRA or CWA provision to suggest that that provision, read in context, has a different meaning in each statute. Accordingly, that provision has an identical meaning in each of the two statutes, requiring that the violation must be alleged to be ongoing at the time notice is given.

[3] The Court in *Gwaltney* relied upon two further aspects of the CWA that differ from EPCRA in significant ways. First, the *Gwaltney* Court noted that the CWA's notice provision bars citizen suits "only if the Administrator or State has commenced an action *'to require compliance.'* " 484 U.S. at 60 n.3 (quoting 33 U.S.C. 1365(b)(1)(B)). The Court cited this statutory language to support its conclusion that the "precluded [CWA] citizen suit is also an action for compliance, rather than an action solely for civil penalties for past, nonrecurring violations." *Ibid*. By contrast, EPCRA bars a citizen suit if EPA has commenced and is diligently pursuing an action "to enforce the requirement concerned *or to impose a civil penalty* under this Act with respect to the violation of the requirement." 42 U.S.C. 11046(e) (emphasis added). That language suggests that an EPCRA citizen suit

2. Petitioner argues (Br. 15-18, 21-24) that permitting citizens' suits for violations abated during the 60-day notice period would be inconsistent with the policies on which the citizens' suit provision is based. In *Gwaltney*, this Court noted that the CWA citizens' suit provision was intended to "give [the alleged violator] an opportunity to bring itself into complete compliance with the Act and thus * * * render unnecessary a citizen suit." 484 U.S. at 60. See also *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 29 (1989) (RCRA). Petitioner argues (Br. 15-18) that permitting EPCRA citizens' suits for violations abated during the 60-day notice period would disserve that purpose, thereby rendering the notice period "gratuitous." See *Gwaltney*, 484 U.S. at 60.

The short answer to petitioner's argument is that, as the text of EPCRA indicates, the EPCRA citizens' suit provision is not based entirely on the purpose of the CWA provision identified by this Court in *Gwaltney*. There are at least three other purposes served by the EPCRA citizens' suit provision. Permitting citizen suits as Congress intended would in no way disserve these purposes or render the 60-day notice period gratuitous.[4]

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could be brought either to enforce compliance or for civil penalties for some past violations. Second, the Court in *Gwaltney* noted the significance of the CWA's definition of "citizen" as "a person * * * having an interest which is or may be adversely affected" to be "[t]he most telling use of the present tense." 484 U.S. at 59 (quoting 33 U.S.C. 1365(g)). That "most telling use of the present tense," *ibid.*, is not present in EPCRA, which instead uses the term "person" and defines it broadly without regard to tense. See 42 U.S.C. 11049(7).

[4] Citing *Morrison* v. *Olson*, 487 U.S. 654 (1988), *amicus curiae* the Washington Legal Foundation mistakenly argues (Br. 24-27) that citizens' suits for past violations of EPCRA violate separation of powers principles by "transferring a unique prosecutorial function from the Executive branch to a private citizen." The cause of action by one private person against another that EPCRA created is much narrower than the delegation of criminal and civil law enforcement authority upheld in *Morrison*. See 487 U.S. at 662 (independent counsel has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice").

a. The 60-day notice period gives the EPA, which must receive a copy of the 60-day notice, see 42 U.S.C. 11046(d)(1), an opportunity to decide whether to assume responsibility for the enforcement action, thereby ousting the citizen suitor. See 42 U.S.C. 11046(e) ("No [citizens' suit] may be commenced * * * if the Administrator [of EPA] has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty."). Cf. *Hallstrom*, 493 U.S. at 29 ("notice allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits"). Permitting citizens' suits for violations abated during the 60-day period is entirely consistent with that purpose.

Petitioner argues (Pet. Br. 24) that permitting such citizens' suits would threaten the government's control over enforcement, because citizens could file suit months or years later "to seek [the] penalties [that] EPA chose [in an earlier administrative proceeding] to forgo." See also *id.* at 46-47 ("Congress could not have intended to permit citizen groups to exhume past violations and then bring penalty actions.").[5] That is incorrect. First, EPA's decision to "commence[] and * * * diligently pursu[e] an administrative order or civil action" bars any future citizens' suit. 42 U.S.C. 11046(e). There is no reason to believe that courts will be unable to administer that provision firmly to preclude abuses by citizen plaintiffs. Second, any EPA enforcement action can be expected to require, at a minimum, that the violator bring itself into compliance with EPCRA. After compliance is achieved, no

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Under amicus's extreme view of Article II, it is likely that all citizen suits, including suits seeking injunctive relief for ongoing violations and qui tam actions, would constitute an unconstitutional intrusion on the Executive's enforcement discretion.

[5] EPA, which receives and reviews all EPCRA 60-day notice letters pursuant to 42 U.S.C. 11046(d), is not aware of any EPCRA citizen suit that has alleged only violations that wholly predate the citizens' notice letter.

citizen suitor could bring suit, because the violation would not be ongoing at the time the citizen attempts to give notice. Third, the United States retains its ability to intervene as of right in any citizens' suit. See 42 U.S.C. 11046(h)(1). Finally, after the agency has addressed the matter, EPA's views regarding the appropriate penalties would be entitled to deference.

b. The 60-day notice period also provides an opportunity for pre-litigation settlement of the case. If the prospective defendant's facility is in compliance, the facts may be brought to the attention of the citizen suitor, thus avoiding litigation entirely. If not, the prospective defendant and plaintiff may work out a settlement of the case, perhaps including safeguards to ensure that the facility does not fall out of compliance in the future. See Pet. App. A14 ("key rationale" is "to require a 'would-be champion to try negotiation before litigation' "). That, too, can avoid the need for litigation.

c. Finally, the 60-day notice period gives the prospective defendant an opportunity substantially to mitigate the penalty or other remedial measures that might be imposed if a lawsuit follows. The maximum statutory penalty of $25,000 per violation accrues on a daily basis, see 42 U.S.C. 11045(c); the defendant can absolutely stop the accumulation of penalties by filing accurate reports even before suit is filed. More important, a key consideration in assessing penalties under most of the environmental statutes is the extent to which the defendant has made a good-faith effort to comply with the law. See, *e.g.*, *Tull* v. *United States*, 481 U.S. 412, 422-423 (1987). EPA's own EPCRA penalty policies—which courts have looked to for guidance in judicial proceedings involving citizen plaintiffs, see, *e.g.*, *Hercules, Inc.* v. *Student Public Interest Research Group of New Jersey, Inc.*, 29 E.R.C. 1417 (D. N.J. 1989); *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1561 (E.D. Va. 1985), aff'd, 791 F.2d 304 (4th Cir. 1986), rev'd on other grounds, 484 U.S. 49 (1987)—take this factor into account in a

number of ways.[6] The 60-day notice period permits a defendant to take advantage of these policies immediately, thereby substantially limiting the potential penalty that may be imposed.[7]

3. Congress's decision to configure EPCRA citizens' suits slightly differently from those under the CWA makes sense. The CWA generally imposes operational

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[6] For example, EPA's penalty policy for EPCRA Section 312 provides that "any prior history of * * * violations" and "the degree of culpability * * * [must] be considered in every penalty assessment." *EPA Penalty Policy For Sections 302, 303, 304, 311, and 312 of [EPCRA] and Section 103 of [CERCLA]* at 22 (June 13, 1990); see also *id.* at 24-27. A defendant who complies quickly—such as during the 60-day notice period—after being informed of a violation of which the defendant was previously unaware will obviously benefit under these provisions. On the other hand, a defendant who delays compliance each year (or who files false or incomplete forms each year) until a citizen suitor provides notice of suit may suffer a greater penalty under these provisions. EPA has a similar penalty policy under EPCRA Section 313. See *Enforcement Response Policy for Section 313 of [EPCRA] and Section 6607 of the Pollution Prevention Act* at 14 (higher penalties for knowing violations), 16-17 (higher penalties for history of violations), 18 (lower penalties "in consideration of the facility's good faith efforts to comply with EPCRA, and the speed and completeness with which it comes into compliance") (August 10, 1992). We have lodged copies of the two penalty policy documents cited in this footnote with the Court and have provided them to the parties.

[7] Although Congress's amendments to the Clean Air Act in 1990 obviously do not control the interpretation of the earlier enacted EPCRA, see Pet. 17-18, we agree with the court of appeals, see Pet. App. A13, that those amendments do support the principle that permitting citizens' suits for at least some past violations is consistent with the purposes underlying the requirement that citizen suitors provide a 60-day notice of suit. That is because Congress amended the Clean Air Act to permit citizen suits against those alleged "to have violated (if there is evidence that the alleged violation has been repeated)" various statutory provisions. 42 U.S.C. 7604(a)(1). While adding that language, which permits suits for past violations, Congress left the Clean Air Act notice provision intact. See 42 U.S.C. 7604(b). Accordingly, Congress must have believed that there was no inconsistency in permitting citizens' suits for past violations but still requiring citizen suitors to provide defendants with 60 days' notice.

requirements on facilities that discharge pollutants into the nation's waters. To comply with the CWA, facilities often have to make substantial investments in new equipment or facilities, and Congress reasonably may have concluded that a company that has made such investments and come into compliance during the brief 60-day notice period will likely continue in compliance and should not face the additional sanctions that might be imposed in a citizens' suit.

EPCRA's regulatory scheme is different from that of the CWA. It requires only reports, not the installation of new facilities or equipment. We do not disagree that compliance with EPCRA's reporting requirements has costs for facilities, as petitioner and its amici emphasize. See, *e.g.*, Pet. Br. 42-45. But Congress may have reasonably concluded that, in general, the costs of EPCRA reports would be much less than the costs of complying with the operational regulations imposed by the CWA, and covered entities would find it much easier to file overdue EPCRA reports within the 60-day notice period than to come into CWA compliance within the same period.[8] Moreover, a facility's decision to file an EPCRA report in a given year often provides little or no assurance that it will do so in the next year, since each year's report is a separate undertaking that may often involve an entirely new effort.

In light of these characteristics of the EPCRA regulatory scheme—not shared by the CWA scheme—the court of appeals correctly discerned that permitting violators to preclude suit by curing violations during the 60-day notice period "would render the citizen enforcement provision virtually meaningless." Pet. App. A14. An owner or

[8] EPCRA generally requires that the reports contain only estimates of chemical inventories and releases. See note 1, *supra*. Petitioner's assertion (Br. 44) that the hasty assembly of reports would expose them to criminal liability under 18 U.S.C. 1001 is wrong. That statute criminalizes "knowing[] and willful[]" false statements. It does not criminalize inadvertent errors.

operator of an EPCRA facility might simply wait to receive a notice of citizens' suit—in a given year or every year—before filing accurate EPCRA reports. Citizens generally have no special access to information regarding potential EPCRA violators, and identifying such violators can be a costly undertaking. It will be difficult for citizen suitors to bear those costs if they can neither recoup their costs nor gain any protection through litigation against future noncompliance. By contrast, the owner or operator would have diminished incentives to incur the annual costs of gathering the information in order to file timely and accurate EPCRA reports, since the option of waiting for the notice of a citizens' suit—if it ever comes—before abating violations would be available and likely to be no more costly.

Petitioner contends that eviscerating the citizens' suit provision in this way would be tolerable, because the EPA always retains the option of enforcing the EPCRA reporting requirements itself. EPA, however, does not have the resources to uncover all EPCRA violations, including failures to file and filing of out-of-date, false, or misleading data. EPA has approximately 20 employees available to enforce EPCRA nationwide. See EPA, *Summary Of The 1998 Budget* 37 (January 1997). This small group must review compliance with and information provided under the EPCRA provisions enforceable through citizens' suits as well as those not so enforceable, see 42 U.S.C. 11002(c), 11003(d), 11021(c), 11022(e)(1), 11042(b)(1), and must identify facilities that did not report at all. For fiscal year 1995, almost 22,000 facilities filed more than 73,000 toxic chemical release forms under Section 313(a) alone. *1995 EPA Toxics Release Inventory* at v (April 1997). According to a 1991 GAO report, another 10,000 facilities—or about one in three required by statute to do so—failed to file Section 313(a) toxic chemical release forms. General Accounting Office, *EPA's Toxic Release Inventory Is Useful but Can Be Improved* 49 (June 1991). Although similar nonreporting data for Sections 311 and 312 are

unavailable, EPA estimates that approximately 860,000 manufacturing and nonmanufacturing facilities are subject to reporting and recordkeeping requirements under Sections 311 and 312 of the Act. See 61 Fed. Reg. 51,107, 51,108 (1996).

Congress was aware of the limited enforcement resources available to EPA, and it has relied on the citizens' suit mechanism—both in EPCRA and in other important environmental statutes—to fill the gap between the number of significant environmental violations and the federal and state enforcement resources available to address such violations. See, *e.g.*, 131 Cong. Rec. 34,650 (1985) (statement submitted by Rep. Glickman) ("In view of the government's limited and overburdened enforcement authority, citizen suits are essential to assure compliance with the law."); House Committee on Public Works and Transportation, *Superfund Amendments of 1985*, H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 5, at 83 (1985) ("Citizens [ ] suits provisions have been found to be helpful both in encouraging diligent Federal enforcement of environmental statutes and in locating and taking actions against violators of these Acts."); 131 Cong. Rec. 34,641 (1985) (statement of Rep. Roe) (same). Cf. *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986). Citizen enforcement authority is especially appropriate under EPCRA because EPCRA is the principal means by which citizens can learn of the hazardous chemicals and toxic emissions in their communities, and because Congress established EPCRA in part specifically to inform the public about toxic releases.[9] See, *e.g.*, 42 U.S.C. 11023(h).

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[9] Petitioner argues (Pet. 46) that, if EPCRA citizens' suits are permitted to go forward, the "federal courts will experience a deluge of EPCRA citizen suits." In determining to permit citizens' suits, Congress has debated and ultimately rejected claims by regulated industry groups that courts would be overrun and industry unduly burdened by citizen enforcement. See, *e.g.*, House Committee on Public Works and Transportation, *Superfund Amendments of 1985*, H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 5, at 83 (1985). See also *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. at 560 (recounting legislative history of Clean Air Act); *Friends of the Earth* v. *Carey*, 535 F.2d 165, 174 (2d Cir. 1976). Indeed, Congress provided for attorneys' fees to help encourage and facilitate such suits. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240, 260 & n.33, 263 (1975) ("Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation."). Moreover, there is no reason to believe that EPCRA's citizen suit provision has spawned an inordinate amount of litigation in the 11 years since it was enacted, despite the fact that aside from the Sixth Circuit's decision in *Atlantic States Legal Found., Inc.* v. *United Musical Instruments U.S.A., Inc.*, 61 F.3d 473 (1995) lower courts have permitted citizens' suits for violations that were corrected during the 60-day notice period. See, *e.g.*, *Don't Waste Arizona, Inc.* v. *McLane Foods, Inc.*, 950 F. Supp. 972, 980 (D. Ariz. 1997); *Idaho Sporting Congress* v. *Computrol, Inc.*, 952 F. Supp. 690, 691-693 (D. Idaho 1996); *Atlantic States Legal Found., Inc.* v. *Buffalo Envelope Co.*, 823 F. Supp. 1065, 1071 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition* v. *Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1140-1141 (E.D. Pa. 1993); *Williams* v. *Leybold Technologies, Inc.*, 784 F. Supp. 765, 768 (N.D. Cal. 1992); *Atlantic States Legal Found., Inc.* v. *Whiting Roll-Up Door Mfg. Corp.*, 772 F. Supp. 745, 753 (W.D.N.Y. 1991).

II. ARTICLE III'S CASE OR CONTROVERSY REQUIREMENT IS SATISFIED WHERE CITIZENS SEEK RELIEF AGAINST A VIOLATOR THAT CEASES ITS ILLEGAL ACTIVITY ONLY AFTER RECEIVING STATUTORY NOTICE OF THE CITIZENS' INTENTION TO SUE

Article III limits the judicial power of federal courts to "cases" or "controversies." That requirement serves both to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and "to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968). One aspect of the case-or-controversy requirement is the standing doctrine. To have standing, plaintiffs must show

"an *injury in fact*" that is "*causal[ly] connect[ed]*" to the challenged conduct and would "likely" be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added).

A. Respondent's complaint adequately alleges that it and its members have suffered and will suffer an "injury in fact" caused by petitioner's failure to file timely EPCRA reports. Respondent has alleged that its offices are located in Chicago and that many of its members live in the area of petitioner's facility. J.A. 4-5. The complaint also alleges that respondent uses EPCRA data to make "reports to its members and the public," J.A. 5, and that its members use EPCRA data "to learn about toxic chemical releases, the use of hazardous substances in their communities, to plan emergency preparedness in the event of accidents, and to attempt to reduce the toxic chemicals in areas in which they live, work and visit." *Ibid.* The complaint alleges that respondent and its members "have been, are being, and will be adversely affected" by petitioner's failure to file timely EPCRA reports. *Ibid.*

Those allegations are sufficient, at this stage in the litigation, see *Defenders*, 504 U.S. at 561; *Bennett* v. *Spear*, 117 S. Ct. 1154, 1165 (1997) (the burden "is relatively modest at this stage of the litigation"), to establish that the statutory right of respondent and its members to EPCRA-mandated information has been impaired. The fact that respondent does not specifically allege a monetary injury is not controlling. Congress may by statute articulate interests and elevate the status of injuries that otherwise would not be sufficient for Article III purposes. See *Defenders*, 504 U.S. at 577. "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (quoting *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)); accord *Defenders*, 504 U.S. at 577. See also *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373 (1982) (holding that "testers" had standing to sue persons who

provided false information in violation of the Fair Housing Act); *Akins* v. *Federal Election Comm'n*, 101 F.3d 731, 735-739 (D.C. Cir. 1996) (en banc) ("If a party is denied information that will help it in making a transaction * * * that party is obviously injured in fact."), cert. granted, No. 96-1590 (June 16, 1997); *Sierra Club* v. *Simkins Indus., Inc.*, 847 F. 2d 1109, 1112-1113 (4th Cir. 1988), (citizen plaintiffs had standing to enforce CWA reporting requirements based on the allegation that they were unable to learn the full extent of pollution in waterways near where they lived), cert. denied, 491 U.S. 904 (1989).

B. Respondent's complaint sought an order requiring petitioner to pay EPCRA civil penalties. J.A. 11. It also requested that petitioner be enjoined to permit respondent, at petitioner's expense, "to inspect [its] facilities and records for compliance with all of the provisions of EPCRA" and that petitioner provide a copy of all of its EPCRA reports to respondent for at least one year. *Ibid.* Finally, the complaint sought a declaratory judgment that petitioner had violated Sections 312 and 313 of EPCRA. *Ibid.* All three of those forms of relief would serve to redress respondent's injury, because all three would tend to prevent petitioner from continuing to violate EPCRA as future annual reports come due.

1. Civil penalties would tend to redress respondent's injury, because their imposition would make it much less likely that petitioner would continue to violate EPCRA as future annual reports come due. Without the prospect of civil penalties imposed in suits by respondent, petitioner might well decide that it would be more profitable to continue to file tardy or inaccurate EPCRA reports and await a notice of suit before abating their violation. Congress devised EPCRA's civil penalty scheme—including the enforcement of that scheme through citizens' suits—to deter just such conduct. Because imposition of civil penalties in this case would be likely to have that precise effect on petitioner, they would likely eliminate or drastically reduce the chances of future violations by petitioner

and thereby redress the grievance of respondent and its members.

In this respect, civil penalties have a deterrent effect similar to that of injunctive relief, which has always been understood to constitute appropriate redress for feared future injuries. See, *e.g.*, *United States* v. *Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952). Indeed, if a court sought to secure compliance with a legal requirement through the issuance of an injunction, the court would similarly rely on the threat of monetary penalties payable to the Treasury (in the form of contempt sanctions) to assure compliance with the injunction. The injunctive remedy and the civil penalty remedy thus ultimately rely on the same sort of monetary sanctions to redress the citizen's injury.[10] Moreover, as this Court stated in

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[10] Petitioner errs in arguing (Br. 38) that "the United States agrees that a past violation cannot confer standing on an environmental citizen suit plaintiff." As we explained in a later filing in this Court shortly after *Gwaltney* was decided, our *Gwaltney* submission was that

> an action brought simply to obtain a judicial assessment of civil penalties for *nonrecurring past violations* would fail to meet Article III's requirements. * * * Obviously, the United States' concern regarding standing was limited to the situation where the citizen plaintiff did not face any prospect of future injury.

88-660 U.S. Br. as *Amicus Curiae* at 13 n.14 (*Simkins Industries, Inc.* v. *Sierra Club*, 491 U.S. 904 (1989) (internal quotation marks omitted)). In *Simkins* itself, where the citizen plaintiff sought civil penalties for violation of a CWA reporting requirement, we stated that

> [a] citizen plaintiff may directly benefit from the imposition of a civil penalty—even if he does not receive the proceeds—because the assessment, like an injunction, deters the violator from continuing the violations that prompted the plaintiff to file the suit. That benefit, which rectifies the plaintiff's injury, is sufficient to satisfy Article III's "redressability" requirement.

Id. at 9. That is the same position we are taking in this case, where the EPCRA violation at issue cannot be said to be a nonrecurring one. See pp. 27-30, *infra*. (We have provided the parties with copies of our brief in *Simkins*.)

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, 417 (1975), "[I]f [violators] faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."

2. The injunctive and declaratory relief respondent seeks would also redress its grievance. An injunction requiring petitioner to permit respondent to inspect petitioner's facilities and to provide respondent with copies of its future EPCRA reports at the time they are filed would make it far easier for respondent to uncover future violations. If petitioner knew that respondent would be looking over its shoulder in that way, petitioner would have greater incentive not to violate EPCRA as future annual reports come due. Similarly, declaratory relief would specifically deter petitioner from violating EPCRA as future reports come due. Specifically, such a declaration would likely subject petitioner to increased penalties as a repeat violator if it again failed to file the required EPCRA reports. Petitioner's awareness of that prospect would add to its incentive to comply as future EPCRA reports come due, and would thereby redress respondent's injury.

C. Insofar as our argument depends on the fact that the relief sought here will redress the threat of future injury to respondent and its members, there can be no doubt that that sort of threat satisfies the "injury in fact" requirements of Article III. See, *e.g.*, *Defenders*, 504 U.S. at 564 (threat of "imminent injury" sufficient for Article III standing). And a long and hitherto unquestioned line of cases has made clear that there is a presumption of such injury when the defendant has voluntarily ceased its illegal activity in response to litigation. Such a voluntary cessation generally "does not deprive the tribunal of power to hear and determine the case." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953); accord *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). On the contrary, the voluntary

cessation of illegal activity would terminate the litigation only if the defendant shows that "subsequent events [make] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Concentrated Phosphate*, 393 U.S. at 203; *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (same); cf. *Vitek* v. *Jones*, 445 U.S. 480, 487 (1980). See also *W.T. Grant Co.*, 345 U.S. at 633 (defendant's burden under this standard is a "heavy one").

The question in the "voluntary cessation" cases is whether, after the defendant has ceased its illegal conduct, the plaintiff is still suffering a sufficient injury in fact to support the litigation, or whether instead the injury the plaintiff formerly suffered has been terminated by the defendant's "voluntary" behavior. Under the voluntary cessation doctrine, even the possibility that the defendant may return to its illegal conduct in these circumstances is sufficient to support the continued existence of an injury in fact, and thereby to support continued Article III jurisdiction. The reason for that presumption is to prevent defendants from manipulating their conduct to escape judicial scrutiny. "The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." *W.T. Grant Co.*, 345 U.S. at 632.

If the mere possibility of a defendant's future return to illegal conduct is sufficient to establish an Article III injury in fact in the mootness context, then Congress may grant plaintiffs who suffer that sort of injury in a given class of cases a cause of action to commence suits based on the same alleged injury.[11] That is because the case-or-controversy requirement "subsists through all stages of

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11 Although this Court has applied the voluntary cessation doctrine only in the mootness context, at least two lower courts have applied the doctrine where the voluntary cessation occurred, as here, prior to filing of the complaint, but after the defendant became aware of an investigation or impending lawsuit. See *Jager* v. *Douglas County Sch. Dist.*, 862 F.2d 824, 833-834 (11th Cir. 1989); *Hall* v. *Board of Sch. Comm'rs*, 656 F.2d 999, 1000-1001 (5th Cir. 1981).

federal judicial proceedings." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Indeed, this Court has described the mootness doctrine as "standing set in a time frame," *Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1069 n.22 (1997); it seeks to ensure that the case or controversy remains "alive" throughout the litigation, *Lewis*, 494 U.S. at 477.

Accordingly, there is no Article III bar to Congress's decision to base standing, in an appropriate class of cases, on the possibility that a defendant, who in response to prospective litigation has voluntarily ceased illegal activity that harmed the plaintiff, will repeat it and thereby harm the plaintiff once again in the future. Of course, if a defendant can carry its burden of showing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Concentrated Phosphate*, 393 U.S. at 203, then the voluntary cessation doctrine would provide no support for the plaintiff's standing in that particular case. Otherwise, however, a plaintiff may rely on Congress's creation of a statutory cause of action for plaintiffs suffering that sort of injury in fact.

That is precisely what Congress has done in fashioning the EPCRA citizens' suit provisions. As we have explained, Congress provided that a citizen may not file an EPCRA enforcement action unless the defendant was violating EPCRA and causing the citizen injury on the statutory notice date, at least 60 days prior to suit. Congress also provided, however, that the citizen may file the suit even if the defendant voluntarily ceases its illegal activity and comes into compliance after receiving the statutory notice. At that point, the citizen faces precisely the same prospect of future injury—the possibility that the defendant will return to its illegal conduct—that this Court has found sufficient to support Article III standing in its voluntary cessation cases. Accordingly, Congress

did not exceed its constitutional authority in granting a cause of action to plaintiffs in this class of cases.[12]

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[12] Application of the voluntary cessation doctrine to the standing inquiry is consistent with the principle that jurisdictional facts are to be assessed at the time the complaint is filed. For example, respondent's complaint alleged that petitioner: had violated EPCRA for more than seven years; did not file required reports until threatened with penalties; and had never demonstrated the willingness or ability to meet EPCRA's statutory deadlines. Under the voluntary cessation doctrine, the facts at the time of the complaint create a presumption that petitioner would again violate the law unless sanctioned.

The general rule requiring jurisdictional facts to be assessed at the time the complaint is filed evolved in the diversity and removal jurisdiction context. See *Mollan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824); *Smith* v. *Sperling*, 354 U.S. 91, 93, n.1 (1957). A principal purpose of the rule was to prevent a party from manipulating a court's subject matter jurisdiction at will. See *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 366-368 (7th Cir. 1993); *Johnson* v. *Burken*, 930 F.2d 1202, 1205 (7th Cir. 1991). That purpose would not be served by allowing a defendant "voluntarily" to halt illegal activity to defeat the court's jurisdiction.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted.

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